93-494

Supreme Court, U.S.
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No. 93-

In The
Supreme Court of the United States
October Term, 1993

SINALOA LAKE OWNERS ASSOCIATION, INC., ETC., ET AL.,

Petitioners,

vs.

CALIFORNIA DIVISION OF SAFETY OF DAMS, a Division of the State of California Department of Water Resources,

Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court's guidance is sorely needed, as this case presents a question of widespread constitutional importance because of conflict among the United States Courts of Appeals.

This case seeks determination of whether the Ninth Circuit erred in affirming District Court dismissal of a suit for prospective injunctive relief, on the ground that the suit was barred by the 11th Amendment to the Constitution.

1. Does the 11th Amendment to the Constitution bar suit in Federal Court against a state, by a citizen of that state, where the relief sought is prospective injunctive relief?

PARTIES TO THE PROCEEDING

Petitioner Sinaloa Lake Owners Association, Inc. (Association) is a non-profit California corporation that owns Sinaloa Dam (Dam) and the land under Sinaloa Lake (Lake).

Petitioners Robert A. Ain, Diantha Ain, Leonard Bellenson, Ann Bellenson, Alvin Bennett, Edward Bergin, individually and as the executor of the estate of Ruth M. Bergin, Edward D. Bigenho, Caryl Bigenho, Junious W. Burrage, Pearl Burrage, Alan T. Canfield, Irene R. Canfield, Robert A. Goossen, Judith A. Goossen, Malcolm R. Harding, Patricia I. Harding, John B. Hayes, Janet H. Hayes, William Hill, William L. Hodson, Dorothy J. Hodson, Donna R. Hull, William J. Hull, Jr., C.R. Joshi, Rekha C. Joshi, Karl Kernberger, executor of the estates of H.R. Kernberger and Monica Kernberger, Shirley E. Najemnik Turner, Elaine D. Price, Richard D. Price, Jannice M. Schnetzler, Peter J. Schnetzler, Fred N. Schultz, Dianne Schultz, William A. Seaman, Jane M. Seaman, E. Dean Seymour, Josephine Seymour, Grace Sorrels, Ronald J. Sparks, Mary Lou Sparks, David L. Strathearn, Jr., Janet M. Strathearn, Sandra Stutzman, and James Stutzman own homes that surround the Lake.

The Association and the individual homeowners are referred to collectively as "Homeowners" in this Petition for Writ of Certiorari.

The State of California acted through officials and employees of respondent California Division of Safety of Dams (DSOD), a division of the State of California Department of Water Resources.

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In The
Supreme Court of the United States
October Term, 1993

SINALOA LAKE OWNERS ASSOCIATION, INC., ETC., ET AL.,

Petitioners,

vs.

CALIFORNIA DIVISION OF SAFETY OF DAMS, a Division of the State of California Department of Water Resources,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Homeowners respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On October 1, 1990, the United States District Court for the Central District of California granted the DSOD's Motion to Dismiss the Homeowners' suit for injunctive relief. (App C) On May 17, 1993, the Ninth Circuit affirmed the District Court's dismissal. (App A) On July 1, 1993, the Ninth Circuit denied

the Homeowners' Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc. (App B)

JURISDICTION

On July 1, 1993, the Ninth Circuit denied rehearing (App B) of the Ninth Circuit's May 17, 1993 decision (App A), which is now final.

This Court has jurisdiction to review the decision by writ of certiorari under 28 USC §1254(1)

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, 11th Amendment:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

In March 1983, the DSOD illegally destroyed the Dam and drained the Lake created by the Dam. For

the past decade, the Homeowners have sought redress in the Federal and State Courts [1] for the DSOD's illegal destruction of the Lake and Dam, which violated the Homeowners' constitutionally protected civil rights and is still causing continuing damage to the Homeowners' homes and lives. The Homeowners' homes move toward the empty Lake bed. [2]

In February and the first days of March 1983, heavy rain raised the water level in the Lake. The DSOD reduced the Lake's water level to its pre-rain level, then to 10% of its pre-rain level, so that by March 11, 1983, no water was retained by the Dam. On March 11, 1983, when the Dam withheld no water, even though there was no longer any danger of flooding, the DSOD destroyed the Dam. [3]

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1 The DSOD attempted to convince both the Federal and State Courts that neither has jurisdiction. The Ninth Circuit has commented on the DSOD's delay tactics. (*Sinaloa Lake Owners Association v. City of Simi Valley* [9th Cir 1989] 882 F 2d 1398, 1403, fn 3)

The difficulties encountered by the Homeowners in their decade-long struggle to achieve redress are in Appendix D, a synopsis of the history of this litigation.

2 See the Homeowners' Third Amended Complaint (Complaint), ¶52. (Excerpts of Record, p 76)

3 The DSOD, by concealing its intention to breach the Dam, prevented the Homeowners from having meaningful access to the courts to halt the destruction. (App D, p 6-7)

The Homeowners by this action seek prospective injunctive relief — a mandatory injunction requiring the DSOD to restore the Dam.

The DSOD moved the District Court for dismissal on the ground that the Homeowners had failed to state a claim for relief pursuant to Fed R Civ P 12 (b)(6).

On October 1, 1990, the District Court dismissed on the ground that the 11th Amendment barred the Homeowners from suing the DSOD in Federal Court. Judgment was entered on the District Court's Order on September 16, 1991. The Homeowners timely filed Notice of Appeal to the Ninth Circuit on October 16, 1991.

On May 17, 1993, the Ninth Circuit affirmed the District Court's dismissal. On July 1, 1993, the Ninth Circuit denied the Homeowners' Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc.

This timely Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The Ninth Circuit's error is its conclusion that the 11th Amendment shields the DSOD from suit in Federal Court when the relief sought is prospective injunctive relief.

The Ninth Circuit:

- ignored this Court's controlling opinion in *Missouri v. Jenkins* (1990) 495 US 33, which held that prospective injunctive relief against a state to remedy continuing violation of constitutional rights is not barred by the 11th Amendment; and instead

- relied on dicta in *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.* (1993) 506 US _____, 1993 US LEXIS 830, 113 S Ct 684, 121 L Ed 2d 605, where 11th Amendment immunity was not before the Court.

PROSPECTIVE INJUNCTIVE RELIEF IS NOT BARRED BY THE 11TH AMENDMENT

Missouri v. Jenkins Is Controlling

The Homeowners' District Court suit for prospective injunctive relief is not barred by the 11th Amendment because the Homeowners seek a mandatory injunction requiring the DSOD to restore the Dam and thereby end a continuing and prospective constitutional deprivation. [4]

In *Jenkins*, this Court held that prospective injunctive relief against states in Federal Court is not barred by the 11th Amendment. Thus, the nature of the relief sought by the Homeowners is determinative of whether the 11th Amendment bars the Homeowners' Federal Court suit against the DSOD. [5]

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[4] The Complaint pled for a mandatory injunction. Paragraph 61 sought: "[a]n order . . . requiring the DSOD and its officials to restore the Dam and the Lake . . . ." Notwithstanding this unambiguous pleading for prospective injunctive relief, the Ninth Circuit noted that although "[t]he district court agreed that prospective relief was available [it] disagreed with the characterization of the relief sought as 'prospective.' " (App A, p 7; see also App C, p 2.)

[5] The Ninth Circuit apparently failed to understand the importance of determining the nature of the relief sought by taking the District Court to task for addressing the nature of the relief sought: "The district court should not have reached the issue of the proper characterization of the requested relief." (App A, p 7)

The Ninth Circuit's most egregious error was ignoring this Court's controlling holding in *Jenkins* — that prospective injunctive relief is not barred by the 11th Amendment. Astoundingly, the Ninth Circuit failed (as did the District Court) to reference *Jenkins* in its opinion. (Apps A and C)

In *Jenkins*, the Court held that prospective injunctive relief is not barred by the 11th Amendment, even if the injunction requires the expenditure of substantial amounts of state money:

> "[T]he Eleventh Amendment does not bar Federal Courts from imposing on the States the costs of securing prospective compliance with a desegregation order . . . ." (*Jenkins*, 495 US at 56, fn 20) [6]

The Eighth Circuit Court of Appeals in *Jenkins*, whose 11th Amendment views were affirmed by this Court, elaborated:

> "The State also argues that the capital improvements ordered by the district court violate the eleventh amendment

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6 In *Jenkins*, the mandatory injunction to desegregate the Kansas City school system was expected to require spending $67,592,072 of State of Missouri funds. (495 US at 38)

'by requiring payment measured by past activities.' . . .

"The argument is without merit. The orders for capital improvements were made necessary in large part by the State's past actions . . . and the extent of relief ordered was 'determined by the nature and scope of the constitutional violation[s],' [citation], including the State's past violations . . . . The orders nonetheless operate prospectively 'to wipe out continuing conditions of inequality' . . . and are therefore valid under the eleventh amendment. [Citation.] . . . The relief granted . . . is wholly prospective in nature, requiring 'payment of state funds * * * as a necessary consequence of compliance in the future with a substantive federal question determination * * *.' [Citations.]" (*Jenkins, etc., et al. v. State of Missouri* [8th Cir 1988] 855 F 2d 1295, 1306-1307)

The same analysis applies here. Although the injunctive relief sought is precipitated by the DSOD's past action, the relief sought is wholly prospective.

Both *Jenkins* opinions build on this Court's earlier decision in *Milliken v. Bradley* (1977) 433 US 267. In *Milliken*, the Court ordered Michigan to pay for compensatory and remedial programs to correct past school segregation, holding:

> "[t]hat the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* . . . . We therefore hold that such prospective relief is not barred by the Eleventh Amendment." (*Milliken*, 433 US at 290; emphasis in original.) [7]

The Ninth Circuit compounded its error in ignoring *Jenkins* by failing to appreciate that the Ninth Circuit's conclusion that "the Eleventh Amendment shields California from suit in Federal Court" (App A, p 5-6) does not rest upon a bedrock of certainty.

Justice William J. Brennan, Jr.'s powerful dissent, in which Justices John Paul Stevens, Harry A. Blackmun, and Thurgood Marshall joined, in

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[7] In *Milliken*, the Court explained the difference between retroactive and prospective relief, as analyzed in *Edelman v. Jordan* (1974) 415 US 651: "Applying traditional Eleventh Amendment principles, we held [in *Edelman*] that the suit was barred to the extent the suit sought 'the award of an *accrued* monetary liability . . .' which represented 'retroactive payments.' [Citation.] Conversely, the Court held that the suit was proper to the extent it sought 'payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination . . . .' [Citation.]" (*Milliken*, 433 US at 289)

Atascadero State Hospital v. Scanlon (1985) 473 US 234, is worth quoting at length:

> "[T]he Court's Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests. In consequence, the Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation. Because I believe that the doctrine rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect, I believe that the Court should take advantage of the opportunity provided by this case to reexamine the doctrine's historical and jurisprudential foundations. Such an inquiry would reveal that the Court . . . has taken a wrong turn. . . .
>
> * * *
>
> "The Court's doctrine itself has been unstable. . . . [T]he doctrine lacks a textual anchor, a firm historical foundation, or a clear rationale. As a result, it has been impossible to determine to what extent the principle of state accountability to the rule of law can or should be accommodated within the competing framework of state nonac-

countability put into place by the Court's sovereign immunity doctrine. . . .

"[T]he paradoxical effect of the Court's doctrine is to require the federal courts to protect States that violate federal law from the legal consequences of their conduct.

"Recent research has discovered and collated substantial evidence that the Court's constitutional doctrine of state sovereign immunity has rested on a mistaken historical premise. The flawed underpinning is the premise that either the Constitution or the Eleventh Amendment embodied a principle of state sovereign immunity as a limit on the federal judicial power. New evidence . . . indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity. Consequently, the Eleventh Amendment could not have been . . . an effort to reestablish a limitation on the federal judicial power granted in Article III. Nor, given the limited terms in which it was written, could the Amendment's narrow and technical language be understood to have instituted a sweeping new limitation on the federal judicial power whenever an individual attempts to sue a State. A close examination of the historical records

> reveals . . . [that] [t]here simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court." (*Atascadero*, 473 US at 247-248, 257-259) [8]

While this Court has, in the past, held that the 11th Amendment precludes actions that seek money damages for past conduct by a state's citizen against that citizen's own state, the above quoted view of 4 justices illustrates that there is reason to question this Court's past holdings.

Reaffirming his emphatically expressed dissent in *Atascadero* from the Court "aggressively expand[ing] its doctrine of Eleventh Amendment sovereign immunity" (473 US at 258), Justice Blackmun stated (in another dissent, joined by Justices Stevens and Marshall) in *Blatchford v. Native Village Of Noatak and Circle Village* [1991] 501 US ____, 111 S Ct 2578, 115 L Ed 2d 686:

> "I do not believe the Eleventh Amendment is implicated by a suit such as this one, in which litigants seek to vindicate federal rights against a State.

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[8] The *Atascadero* 11th Amendment immunity for violations of the statute construed therein was abrogated by Congress in 1986. (*McGregor v. Louisiana State University* [ED La 1992] 1992 US Dist Lexis 11787)

> In my view, the Amendment has no application outside the context of State/citizen and State/alien diversity suits." (*Blatchford*, 115 L Ed 2d at 700)

In *Paschal v. Didrickson* (1992) US LEXIS 626, 112 S Ct 992, 117 L Ed 2d 152, the Court denied a petition for writ of certiorari to review a Seventh Circuit holding (936 F 2d 940, 945) that an accrued monetary liability against Illinois was barred by the 11th Amendment. Justice Byron R. White dissented, noting a conflict among the Courts of Appeals deserving resolution by this Court. [9]

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[9] Justice White cited 3 cases where Courts of Appeals held that retroactive monetary relief was not barred by the 11th Amendment: *Brown v. Porcher* (4th Cir 1981) 660 F 2d 1001, 1007, cert denied 459 US 1150; *Bennett v. White* (3d Cir 1989) 865 F 2d 1395, 1408, cert denied 492 US 920; and *Foggs v. Block* (1st Cir 1983) 722 F 2d 933, 941, fn 6, reversed on other grounds *sub nom Atkins v. Parker* (1985) 472 US 115.

Puerto Rico v. Metcalf Offers No Guidance For Deciding The Case At Bench

In the opinion at bench, while ignoring what this Court did in the controlling *Jenkins* decision, the Ninth Circuit instead relied on dicta in *Puerto Rico,* which offered no guidance for a decision herein. (App A, p 7)

Puerto Rico does say, as the Ninth Circuit noted, in regard to the 11th Amendment:

> "[T]he exception is narrow . . . and has no application in suits against the States . . . which are barred regardless of the relief sought." (*Puerto Rico,* 121 L Ed 2d at 614; App A, p 7)

Most importantly however, 11th Amendment immunity was not before the *Puerto Rico* Court. The only issue was whether that immunity may be asserted on an appeal before final judgment.

That prospective injunctive relief was not an issue before the Court is shown in the first sentence of Justice White's opinion:

> "The question before the Court is whether a district court order denying a claim by a State . . . to Eleventh Amendment immunity from suit in federal court may be appealed under the

> collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp. [citation]." (*Puerto Rico*, 121 L Ed 2d at 610)

That the scope of 11th Amendment immunity was not being decided in *Puerto Rico* is reconfirmed where the Court says, "We likewise express no view on the merits of the immunity claim." (121 L Ed 2d at 611, fn 1)

Reliance on *Puerto Rico* is misplaced because statements by a court on issues not before a court for determination are not precedential authority. They are dicta, and "stare decisis does not attach to such parts of an opinion of a court which are mere dicta." (20 Am Jur 2d [1965] *Courts* §190, p 526):

> "[The] remarks were not essential to the decision so that even if they had been accepted by the full Court they would not be conclusive in this case . . . ." (*Green v. U.S.* [1957] 355 US 184, 197, fn 16)

A state may be sued in Federal Court by that state's citizens when prospective injunctive relief is sought.

By the plain words of the 11th Amendment, citizens of a state ought to be able to sue that state for any relief.

CONCLUSION

The Ninth Circuit denied issuance of the prospective injunctive relief that would partially redress the DSOD's violation of the Homeowners' constitutionally protected civil rights. *Jenkins* and *Milliken* stand for the rule that Federal Courts have jurisdiction over suits against states.

As guardian of civil rights and liberties, self-abnegation by the Ninth Circuit was regrettable. As the Homeowners' constitutional rights are being currently violated, this case deserves the Court's attention: The Court's power to require state obedience to the Constitution is too important to sanction the out-of-hand dismissal of which this case is an example.

Before the DSOD's illegal destruction of the Dam, which created the Lake, the Homeowners used the Lake for water sports, boating, fishing, and swimming. The Lake was an aesthetic, scenic amenity. However, for the past decade, the Lake has been an eyesore — a mud hole infested with insects and choked with weeds. Since the Lake was emptied of its water, the Lake's shores have been subsiding. (App E)

For 10 years, the Homeowners have been hapless victims of their homes' continuing structural deterioration. The Homeowners' homes are shifting and cracking as the land supporting their homes — no longer held in place by the Lake — subsides and moves toward the empty Lake bed.

A prospective injunction to restore the Dam and thereby partially remedy the DSOD's violation of the Homeowners' constitutional rights is within Federal Court jurisdiction.

This Court's guidance is needed. The Homeowners pray that certiorari be granted following the holding of *Jenkins*.

Respectfully submitted,

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Sinaloa Lake Owners Association, Inc. and the individual Homeowners

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SINALOA LAKE OWNERS ASSOCIATION; ROBERT A. AIN; DIANTHA AIN; LEONARD BELLENSON; ANN BELLENSON; ALVIN BENNETT; EDWARD T. BERGIN; EDWARD T. BERGIN, executor of the estate of Ruth M. Bergin; EDWARD D. BIGENHO; CARYL BIGENHO; JUNIOUS W. BURRAGE; PEARL BURRAGE; ALAN T. CANFIELD; IRENE R. CANFIELD; ROBERT A. GOOSSEN; JUDITH A GOOSSEN; MALCOLM R. HARDING; PATRICIA I. HARDING; JOHN B. HAYES; JANET H. HAYES; WILLIAM HILL; WILLIAM L. HODSON; DOROTHY J. HODSON; DONNA R. HULL; WILLIAM J. HULL, JR.; C.R. JOSHI; REKHA C. JOSHI; KARL	C.A. No. 91-56352 D.C. No. CV-83-8220-ER MEMORANDUM * (Filed May 17, 1993)

continued on next page

*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by 9th Cir. R. 36-3.

KERNBERGER, executor for the estates of Monica Kernberger and H.R. Kernberger; SHIRLEY E. NAJEMNIK TURNER; ELAINE D. PRICE; RICHARD D. PRICE; JANNICE M. SCHNETZLER; PETER J. SCHNETZLER; FRED N. SCHULTZ; DIANNE SCHULTZ; WILLIAM A. SEAMAN; JANE M. SEAMAN; E. DEAN SEYMOUR; E. DEAN SEYMOUR; JOSEPHINE SEYMOUR; GRACE SORRELS; RONALD J. SPARKS; MARY LOU SPARKS; JANET M. STRATHEARN; DAVID L. STRATHEARN, JR.; SANDRA STUTZMAN; JAMES STUTZMAN,

Plaintiffs-Appellants,

v.

CALIFORNIA DIVISION OF SAFETY OF DAMS, a Division of the California Department of Water Resources, et al.,

Defendant,

and

STATE OF CALIFORNIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued April 5, 1993, Pasadena, California
Submitted April 12, 1993

Before: FARRIS, NORRIS, and REINHARDT, Circuit Judges

Sinaloa Lake Owners Association and individual homeowners appeal the district court's order dismissing the State of California as a defendant. The Association and the homeowners sought an injunction ordering the State, through its Division of Safety of Dams, to rebuild Sinaloa Dam and Sinaloa Lake. The district court dismissed the State on Eleventh Amendment grounds. We affirm.

I.

The Association and the individual homeowners filed suit against the Division of Safety of Dams and several of its officials in their individual capacities under 42 U.S.C. §1983, alleging the deprivation of various constitutional rights. On appeal from the entry of judgment on the pleadings against the plaintiffs, we reversed in part and remanded, holding that the plaintiffs' due process claims were adequately alleged and ripe for review. Sinaloa Lake Owners

Association v. City of Simi Valley, 882 F.2d 1398, 1404-10 (9th Cir. 1989).

On remand, the district court granted the State of California's motion to dismiss on the ground that suit against it was barred by the Eleventh Amendment. The order dismissing the State was filed on October 1, 1990, and judgment was entered on September 6, 1991. The Association and individual homeowners filed notice of appeal on October 16, 1991.

II.

The district court's dismissal order, which dismissed the State of California (and therefore the California Division of Safety of Dams), but which did not dismiss the individual defendants, was not an appealable order when issued because it did not adjudicate the rights and liabilities of all the parties. See Fed. R. Civ. P. 54(b); 28 U.S.C. §1291 (1988).

On May 11, 1992, more than six months after filing their notice of appeal and more than three weeks after filing their Reply Brief with this court, the Association and individual homeowners prevailed upon the district court to issue a Rule 54(b) certification which, if valid, provides the basis for our jurisdiction over this appeal.

Our jurisdiction thus turns on the validity of the Rule 54(b) certification, which itself hinges on whether the district court was divested of the power

to issue the certification upon the filing of the notice of appeal.

The filing of a notice of appeal usually divests the district court of jurisdiction over matters appealed. McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731, 734 (9th Cir.), cert. denied, 459 U.S. 1071 (1982). The divestiture rule is, however, merely a " 'judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes nor to induce needless paper shuffling.' " Kern Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 734 (9th Cir.) (quoting Moore's Federal Practice §203.11, at 3-45 n.1 (2d ed. 1987)), cert. denied, 488 U.S. 948 (1988). We decline to apply the divestiture doctrine here.

We hold that the district court retained the power to issue a Rule 54(b) certification despite the intervening filing of the notice of appeal. We therefore have jurisdiction to consider the merits of this appeal.

III.

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U.S. Const. amend. XI. Although by its terms the Amendment bars only suits predicated upon citizen-state diversity, the Supreme Court has expanded its scope to prohibit suits against a state by its own citizens, Durning v. Citibank, N.A., 950 F.2d 1419, 1422-23 (9th Cir. 1991) (citing Hans v. Louisiana, 134 U.S. 1, 9-21 (1890)), as well as to immunize state agencies, Durning, 950 F.2d at 1423 (citing State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199 (1929)).

Thus, unless the state waives its immunity or Congress validly abrogates it, "a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 100 (1984). "This jurisdictional bar applies regardless of the nature of the relief sought." Id.

A suit against a state official that challenges the constitutionality of that official's action is not barred by the Eleventh Amendment, unless it "is in fact a suit against [the] State." Id.; see Ex parte Young, 209 U.S. 123 (1908). The relief available in such suits, however, is limited to prospective relief; retroactive relief — money damages for past injuries — is barred by the Eleventh Amendment where those damages will be paid from the state treasury. Edelman v. Jordan, 415 U.S. 651 (1974).

The Association and individual homeowners argue that the Eleventh Amendment does not prevent a federal court from granting prospective injunctive relief against a state for a continuing deprivation of a federal right, and that the relief they seek — the rebuilding of Sinaloa Dam and Lake — is of that nature. The district court agreed that prospective relief was available but disagreed with the characterization of the relief sought as "prospective." See Appellants Excerpts of Record at 101-06.

The district court should not have reached the issue of the proper characterization of the requested relief. The doctrine of Ex parte Young, which permits suits against state officials for violations of federal constitutional rights, and that of Edelman, which limits the scope of permissible relief, have "no application in suits against the States and their agencies, which are barred regardless of the relief sought." See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 688 (1993) (Citing Cory v. White, 457 U.S. 85, 91 (1982)).

We affirm the order dismissing the State of California, on the ground that the Eleventh Amendment shields California from suit in federal court. See Kruso, 872 F.2d at 1421 (appeals court may affirm on any ground finding support in the record).

AFFIRMED.

APPENDIX B

B 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SINALOA LAKE OWNERS ASSOCIATION; ROBERT A. AIN; DIANTHA AIN; LEONARD BELLENSON; ANN BELLENSON; ALVIN BENNETT; EDWARD T. BERGIN; EDWARD T. BERGIN, executor of the estate of Ruth M. Bergin; EDWARD D. BIGENHO; CARYL BIGENHO; JUNIOUS W. BURRAGE; PEARL BURRAGE; ALAN T. CANFIELD; IRENE R. CANFIELD; ROBERT A. GOOSSEN; JUDITH A GOOSSEN; MALCOLM R. HARDING; PATRICIA I. HARDING; JOHN B. HAYES; JANET H. HAYES; WILLIAM HILL; WILLIAM L. HODSON; DOROTHY J. HODSON; DONNA R. HULL; WILLIAM J. HULL, JR.; C.R. JOSHI; REKHA C. JOSHI; KARL KERNBERGER, executor for the estates of Monica Kernberger and H.R. Kernberger; SHIRLEY E. NAJEMNIK TURNER; ELAINE D. PRICE; RICHARD D. PRICE;	C.A. No. 91-56352 D.C. No. CV-83-8220-ER ORDER (Filed July 1, 1993)

continued on next page

JANNICE M. SCHNETZLER; PETER J. SCHNETZLER; FRED N. SCHULTZ; DIANNE SCHULTZ; WILLIAM A. SEAMAN; JANE M. SEAMAN; E. DEAN SEYMOUR; E. DEAN SEYMOUR; JOSEPHINE SEYMOUR; GRACE SORRELS; RONALD J. SPARKS; MARY LOU SPARKS; JANET M. STRATHEARN; DAVID L. STRATHEARN, JR.; SANDRA STUTZMAN; JAMES STUTZMAN,

Plaintiffs-Appellants,

v.

CALIFORNIA DIVISION OF SAFETY OF DAMS, a Division of the California Department of Water Resources, et al.,

Defendant,

and

STATE OF CALIFORNIA,

Defendant-Appellee.

Before: FARRIS, NORRIS, and REINHARDT, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

C 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SINALOA LAKE OWNERS ASSOCIATION, INC., etc., et al., Plaintiff, v. CALIFORNIA DIVISION OF SAFETY OF DAMS, a Division of the California Department of Water Resources, et al., Defendants.	No. CV 83-8220-ER ORDER: GRANTING DEFENDANT STATE OF CALIFORNIA'S MOTION TO DISMISS (Entered September 16, 1991) (Filed October 1, 1990) THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D)

Having read and considered the pleadings filed in this matter, and having considered the oral argument presented at the hearing, IT IS HEREBY ORDERED that defendant State of California's motion to dismiss is granted.

The Court finds that this suit against the state is barred by the Eleventh Amendment. The Eleventh Amendment bars suit in federal court against a state by a citizen of that or another state absent waiver by the state or clear authorization by Congress. Edelman v. Jordan, 94 S.Ct. 1347 (1974). The Eleventh Amendment does not, however, bar suit against state officials when their actions violate the Constitution because these acts cause the official to be "stripped of his official or representative character and subjected to the consequences of his conduct." Ex Parte Young, 209 U.S. 123, 160 (1908). Further, "an award of prospective relief [against a state official] that requires ancillary payment from the state treasury" is not barred by the Eleventh Amendment. Goodisman v. Lytle, 724 F.2d 818 (9th Cir. 1984).

The Court does not believe the relief sought against the state can be characterized as prospective injunctive relief for a continuing deprivation of a federal right involving mere ancillary state expenditures. First, plaintiff has wholly failed to identify what continuing violation of their constitutional rights has occurred. Second, plaintiff seeks an injunction to cease continuing refusal to restore the dam. This in essence is a request to force the state to pay for the cost of replacing the dam. The breach of the dam was completed in 1983. This is retroactive monetary relief, rather than prospective relief. This case is unlike the numerous school desegregation cases cited by plaintiff. Those cases involve clear, ongoing violations of federally protected rights. Such is not the case here. Accordingly, this action is dismissed as to the state defendant with prejudice.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: October 1, 1990

/s/ Rafeedie
EDWARD RAFEEDIE
Unites States District Judge

APPENDIX D

D 1

SYNOPSIS OF THE LITIGATION'S HISTORY

FACTS: 1983

The Sinaloa Dam (Dam) and Sinaloa Lake (Lake) are near the City of Simi Valley (City), in an unincorporated area of Ventura County (County), California. The California Division of Safety of Dams (DSOD) is responsible for inspecting non-federally owned dams in California. (Joint Pre-Trial Conference Order [PTC], Excerpts of Record [ER] P 65 L 10-13) [1]

The Dam is an earth fill structure 30 feet high and 800 feet long, constructed in the 1920's. The Dam has the capacity to impound approximately 200-acre feet of water. (PTC, ER P 65 L 23-26) There is a spillway southwest of the Dam, designed to limit the elevation of water behind the Dam. (August 19 Reporter's Transcript [RT] P 121 L 11-17) The spillway level is

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[1] All record citations in this Appendix are to the record in the Homeowners' (identified on page ii of the Petition) third appeal to the Ninth Circuit following the August 1992 District Court dismissal of the Homeowners' action against the DSOD officials. (Infra, p 14) If it would assist the Court, the Homeowners will ensure that the August 1992 record is promptly made available to the Court.

Some facts are from the "admitted facts" section of the PTC. Most facts are from trial testimony. A few facts about damages are from the Homeowners' Third Amended Complaint (Complaint), as the damages phase of the trial, which was bifurcated from the liability phase, was not tried.

lower than the Dam's crest. (PTC, ER P 66 L 1-2) Thus, if the water level approaches the crest, water escapes through the spillway, thereby preventing overtopping of the Dam. (August 26 RT P 18 L 20 - P 19 L 2)

On February 11, after inspecting the Dam, the DSOD wrote to James Stutzman, former President of the Sinaloa Lake Homeowners Association (Association), directing the Association to take some corrective action and report back to the DSOD no later than March 15. (PTC, ER P 66 L 21 - P 67 L 11; Trial Exhibit 400, ER P 95-96)

Between February 25 and March 2, heavy rains raised the Lake's water level. (PTC, ER P 67 L 12-14; August 19 RT P 143 L 24 - P 145 L 3) On March 2, there were 2 slides on the Dam's face. (PTC, ER P 67 L 15-16; August 20 RT P 15 L 8-15)

Although the Dam is outside City limits, after learning of the slides, the City convened a meeting of the Association and City and County officials to take action to:

- reduce the Lake's water level with siphons and pumps;

- cover the exposed downstream Dam face with plastic sheeting; and

- open the flood gate, a device which lets controlled water flow through the Dam. (PTC, ER P 67 L 21-27)

By 11:00 p.m. on March 2, the City had evacuated 98% of downstream residents, even though:

- the only hint of potential danger was the 2 slides; and

- no qualified person had concluded that the slides posed an imminent threat to life or property. (August 20 RT P 73 L 2-10; August 19 RT P 126 L 9 - P 129 L 8)

By the next morning, March 3, rain had stopped, and emptying the Lake by pumping and siphoning was underway. (PTC, ER P 68 L 4-19) DSOD officials Sheldon McEwan and David Jacinto arrived at the Dam. Jacinto assumed control. (PTC, ER P 68 L 9-19; August 25 RT P 90 L 8-12)

On March 4, the U.S. Army Corps of Engineers (Corps) inspected the Dam and reported that the Dam was stable and safe. (August 20 RT P 29 L 5-8, P 69 L 24- P 70 L 1; August 21 RT P 6 L 7-10)

On March 4, notwithstanding the Corps' evaluation, and without advising the Homeowners, DSOD Division Chief James Doody and other DSOD officials decided to breach the Dam and drain the Lake.

(PTC, ER P 69 L 7-8; August 21 RT P 126 L 15-25, P 138 L 12-20; August 26 RT P 117 L 24 - P 120 L 22; August 27 RT P 123 L 15 - P 124 L 1) However, the decision to breach was not then implemented. Lowering the water level continued.

On March 5, at 3:00 p.m., the City decided that any "emergency" was over. The City advised evacuated residents to return to their homes. (PTC, ER P 69 L 20-21) By midnight, the water level was 12.5 to 14.5 feet below the Dam's crest. (August 20 RT P 28 L 9-11; Trial Exhibit 5519, ER P 97)

On March 6, the water in the Lake was 14 feet below the high water mark. Doody rescinded the order to breach the Dam (PTC, ER P 13 L 3-4; Trial Exhibit 432, ER P 98) and instead ordered workers to proceed with plans to lower the spillway elevation to 10 feet below the Dam crest.

By the morning of March 8, any supposed "emergency" had certainly passed:

- the heavy rain had not occurred for 5 days; and

- the water level had been lowered by 19 feet, almost 22 feet below the Dam crest. (PTC, ER P 71 L 9-10; Trial Exhibit 5519, ER P 97)

On March 9, engineers whom the Association had retained to evaluate the Dam's condition and prepare

a plan in response to the DSOD's February 11 letter were working at the site. The engineers became concerned that the DSOD officials might order a breach of the Dam, and they reported their suspicion to the acting Association President, Fred Schultz. (August 25 RT P 12 L 23 - P 13 L 1)

On March 9, Schultz telephoned DSOD Division Chief Doody, who refused to confirm or deny the DSOD's intentions. Doody instead said he would be at the Dam on Friday, March 11 to decide whether the DSOD would breach the Dam. (August 25 RT P 13 L 21 - P 14 L 10)

By 8:00 a.m. on March 10, the Lake's water level was 24 feet below the high water mark; 90% of the water was gone. (August 20 RT P 34 L 1-2; Trial Exhibit 5519, ER P 97)

At the direction of the DSOD officials, the contractors began the spillway deepening. (PTC, ER P 71 L 18-19) But, even as this work continued, on March 10, DSOD officials Doody, Jacinto, Roger Stephenson, Vernon Persson, and James Ley decided to breach the Dam, notwithstanding Doody's assurances that no decision would be made before the March 11 inspection. (August 25 RT P 62 L 1-10; August 26 RT P 137 L 15-25)

The DSOD official on site, McEwan, kept the decision to breach the Dam a secret from the Homeowners. McEwan told Schultz that the DSOD wanted the Homeowners to return the valve wheel (which controlled the floodgate and thus the Lake's

water level) to the DSOD so that the DSOD could open the floodgate and drain the rest of the Lake's water. Schultz gave the wheel to the DSOD. (Trial Exhibit 471, ER P 153)

On the morning of March 11, the Homeowners saw bulldozers at the Dam. That morning, DSOD officials Doody, Jacinto, and McEwan admitted that they had "again" decided to breach the Dam, even though the Dam was not restraining any water — "[t]here was a puddle of water in the Lake." (August 20 RT P 34 L 2-3; Trial Exhibit 5519, ER P 97)

The Homeowners' experts testified that to overtop the Dam on March 11, it would had to have rained 32 inches in a 3-day period. (August 20 RT P 119 L 12-14) A once in 10,000-year storm (which occurs on the average once every 10,000 years [August 25 RT P 116 L 11-13]) would only produce a maximum of 17 inches of rain in 3 days. (August 25 RT P 116 L 11-13) [2]

The Homeowners secured an informal hearing before a Ventura County Superior Court Judge at 4:00 p.m. on Friday, March 11, hoping to obtain a temporary restraining order preventing the DSOD officials from breaching the Dam. (PTC, ER P 72 L 1 - 17) Doody and Stephenson insisted that an "emergency" existed, necessitating the breach. Doody misin-

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2 In any event, at 10.30 a.m., the weather forecast was: March 11 partly cloudy; March 12 decreasing clouds; and March 13 fair weather. (Trial Exhibit 5584, ER P 133)

formed the court that a major storm was predicted, even though, as Jacinto and Stephenson knew, the weather forecast was good (fn 2). (Trial Exhibit 449, ER p 131; August 26 RT P 90 L 7-24; August 25 RT P 25 L 12-20, P 75 L 10-11, P 98 L 3-5)

Although the DSOD presented no evidence that the Dam was unsafe, the judge declined to act because the Homeowners were unable to produce a completed engineering study or testimony from an engineer showing that the Dam was safe. (August 25 RT P 23 L 16 - P 24 L 3, P 56 L 7-9, P 74 L 22-24; PTC, ER P 72) [3] No order was entered, and no record was made of the in-camera proceedings. [4]

At 5:00 p.m. on March 11, even though DSOD contractor Robert Tucker believed the Dam was stable and safe and there was no water held by the Dam, the contractor followed Jacinto's orders and began to breach the Dam. (PTC, ER P 73 L 1-4)

By March 17, the breach was complete. (August 26 RT P 76 L 13-17) Since then, the former Lake has been a mud hole infested with insects and choked

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3 The Homeowners had only 2 hours to prepare for the "hearing." (August 25 1992 RT P 53 L 13-16, P 56 L 7-9, P 73 L 20 - P 74 L 2)

4 The Ninth Circuit was not impressed with that "hearing." (*Sinaloa Lake Owners Association v. City of Simi Valley* (9th Cir 1989) 882 F 2d 1398, 1406, fn 7)

with weeds. (Complaint, ER P 42 L 13-14; see App E. [5])

The DSOD has refused the Homeowners' requests that the Dam be repaired and the Lake restored. (Complaint, ER P 42 L 14-15) Instead of a scenic amenity, the Lake is an eyesore. (Complaint, ER P 42 L 13-14; App E.)

Since the Lake was emptied of water that supported its shores, the Lake's shores have subsided. The Homeowners' homes continue to shift and crack as the land that supports the Homeowners' homes subsides and moves toward the empty Lake bed. (Complaint, ER P 42 L 20-22)

The structural damage to the Homeowners' homes continues to worsen and to August 1992 includes:

- cracks in walls and floors;
- subsidence of foundations' appurtenant structures;
- separation of beams from ceilings; and

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5 The Appendix E photographs are from pages 9 and 15 of the Homeowners' opening brief in their first appeal to the Ninth Circuit. (Infra, p 11) The photograph of the Lake before the breach was also on page 8 of the Homeowners' opening brief in their pending third appeal to the Ninth Circuit. (Infra, p 14)

- sticking doors and windows. (Complaint, ER P 43 L 2-11)

PROCEDURE

This section details the Homeowners' 3 appeals to the Ninth Circuit, as well as their State Court action in the California courts.

The Homeowners filed suit in Federal Court under 42 USC §1983 on December 16, 1983, alleging deprivation of their 4th, 5th, and 14th Amendment rights. The Homeowners' second amended complaint was filed on July 2, 1984. On October 5, 1984, the DSOD (in contrast to the DSOD officials who did the actions and were also sued) was dismissed on 11th Amendment grounds. That dismissal was not appealable. [6]

On May 15, 1986, a month before the case was scheduled to go to trial, to the District Court's expressed displeasure, the defendants moved for judgment on the pleadings, claiming that the case was not ripe for decision. The day before trial, the

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6 All interlocutory orders not otherwise appealable are merged in the judgment and can be reviewed on appeal from the final judgment. (E.g., *Victor Talking Mach. Co. v. George* [3rd Cir 1939] 105 F 2d 697, 699; *Potts v. Village of Haverstraw* [2d Cir 1937; L. Hand, J.] 93 F 2d 506, 509.)

District Court felt compelled to grant the motion.[7] After their motion to amend the judgment was denied, the Homeowners timely appealed to the Ninth Circuit.

On appeal, the Ninth Circuit[8] affirmed in part and reversed in part. Dismissal of the 5th Amendment taking claim (and dismissal of the 4th Amendment claim) was affirmed because an action for compensation was available in State Court and had not been attempted. (*Sinaloa*, 882 F 2d at 1404, 1411) However, the procedural and substantive due process claims were held to be ripe for litigation, and the judgment dismissing them was reversed. (*Sinaloa*, 882 F 2d at 1411)

The Ninth Circuit remanded for further proceedings consistent with its opinion. (*Sinaloa*, 882 F 2d at 1411) On March 5, 1990, this Court denied the individual DSOD officials' Petition for Writ of Certiorari (No. 89-473).

After the Ninth Circuit's remand, the DSOD moved the District Court for dismissal on the ground

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7 The Ninth Circuit noted both the procedural events and the District Court's unhappiness. (*Sinaloa*, 882 F 2d at 1403, fn 3)

8 Ninth Circuit Docket No. 86-6425. The Ninth Circuit's August 9, 1989 Second Amended Opinion followed the Ninth Circuit's denial of the individual DSOD officials' Petition for Rehearing and Suggestion for Rehearing En Banc.

that the Homeowners had failed to state a claim for relief pursuant to Fed R Civ P 12 (b)(6).

On October 1, 1990, the District Court dismissed on the ground that the 11th Amendment barred the Homeowners from suing the DSOD in Federal Court. Judgment was entered on the District Court's Order on September 16, 1991. The Homeowners timely filed Notice of Appeal to the Ninth Circuit on October 16, 1991. (Ninth Circuit Docket 91-56352)

On May 17, 1993, the Ninth Circuit affirmed the District Court's dismissal. On July 1, 1993, the Ninth Circuit denied the Homeowners' Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc. The instant timely Petition for Writ of Certiorari followed.

Because substantive federal claims had been remanded for trial, the Ninth Circuit had suggested that "it would be entirely appropriate on remand" for the District Court to treat the 5th Amendment taking claim as within the District Court's pendent jurisdiction and try it with the due process claims. (*Sinaloa*, 882 F 2d at 1404, fn 4) The Homeowners sought leave to amend their Complaint to add the taking issue as a pendent state cause of action. However, the District Court denied leave to add the pendent taking claim. (ER P 19)

The Homeowners then filed a State Court inverse condemnation action. By the time the DSOD's demurrer was heard, the Ventura County Superior Court had been presented with a foot-thick pile of

documents related to both the pending and the earlier Federal Court proceedings. Perhaps lost in that pile was the fact that — excluding only the time from the filing of the federal complaint and the 1986 entry of an appealable federal judgment — only 4 years, 9 months, and 18 days of the 5-year limitation period had elapsed. [9]

In sustaining the DSOD's demurrer without leave to amend, the Superior Court, on December 26, 1990, held simultaneously that:

- the DSOD's demurrer on the ground of "another action pending" must be granted because the existing Federal Court action was based "on the same underlying facts and the same relief is involved"; and

- the DSOD's demurrer on the ground of the statute of limitations must also be granted because the DSOD had not been a party to the federal litigation since 1984.

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9 The statute of limitations was then 5 years. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* [1985] 39 C 3d 862, 867-868) Thus, the Homeowners had 5 years from March 11, 1983 — plus any time during which the running of that time was tolled — to file suit. The DSOD agreed, contesting only the date on which the tolling ended.

Thus, the Superior Court dismissed the State Court action because the state *is* and *is not* a party to the federal litigation.

On September 8, 1992, the California Court of Appeal for the Second Appellate District, Division Six, taking an equitable view, granted the Homeowners' appeal from the Superior Court ruling. [10] However, thereafter, the Court of Appeal granted the DSOD's Petition for Rehearing on October 6, 1992, and on February 25, 1993, (the same panel of) the Court of Appeal reversed itself and issued a rigid opinion with a doctrinaire use of limitations statutes, affirming the Superior Court's paradoxical judgment.

On March 24, 1993, the California Court of Appeal denied the Homeowners' request for a second rehearing. On May 26, 1993, the California Supreme Court denied review.

Meanwhile, on August 18, 1992, trial commenced in the Homeowners' District Court suit against the individual DSOD officials. At the conclusion of the Homeowners' case, the DSOD officials moved for judgment as a matter of law under Fed R Civ P 50, claiming qualified immunity.

The District Court granted judgment as to the 5 subordinate DSOD officials but deferred ruling on Doody, the "lead" official, until after Doody had pre-

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[10] California Court of Appeal, Second Appellate District, Division Six, 2d Civ No B058728.

sented his case. At the conclusion of Doody's case on August 27, 1992, the District Court granted Doody judgment.

The Homeowners timely filed an appeal (third appeal) to the Ninth Circuit. (Ninth Circuit Docket No. 92-56399) Briefs are complete. Oral argument has yet to be scheduled.

APPENDIX E

Sinaloa Lake before Dam was breached in March 1983.

Sinaloa Lake after breach. Dam base is visible at pink arrow. Note water level below Dam base. Yellow arrow shows breach.